

## Monitoring the monitors: EU enlargement conditionality and minority protection in the CEECs

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**Monitoring the Monitors: EU Enlargement Conditionality  
and Minority Protection in the CEECs**

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# Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs\*

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*The issue of minority protection is an extreme case for analyzing the problem of linkage between EU membership conditionality and compliance by candidate countries. While EU law is virtually non-existent, EU practice is divergent, and international standards are ambiguous, the issue has been given high rhetorical prominence by the EU during enlargement. The analysis in this article follows a process tracking approach to study the relationship of EU conditionality to changes in minority rights protection in the CEECs. The authors examine how the EU's monitoring process has operated, what its benchmarks have been, how the EU process has interacted with those of other international organizations, such as the Council of Europe and OSCE, and evaluate what its impact has been on the candidate countries. In conclusion, the authors find that EU conditionality is not closely temporally correlated with the emergence of new strategies and laws on minority protection in the CEECs. Instead, the EU's main instrument for accession and convergence, the Regular Reports, have been characterized by ad hocism, inconsistency, and a stress on formal measures rather than substantive evaluation of implementation.*

## I. Introduction

The 'Copenhagen criteria' have been widely viewed as constituting a successful incentive structure and sanctioning mechanism for the European Union (EU) in the promotion of human rights and the protection of minorities. The EU's 'conditionality' on the accession of the Central and Eastern European candidate countries (CEECs) is one that potentially embodies a power asymmetry whereby the EU can use conditionality as an instrument to exert political leverage on candidates to ensure the requisite outcomes in policy or legislation. The leverage of conditionality is understood as one of the primary means of 'democracy promotion' and the creation of 'foreign made democracy' by the EU in the CEECs.<sup>1</sup> There are, however, few studies that have systematically analyzed the application and impact of conditionality, in particular political conditionality, towards the CEECs in specific policy areas or its evolution over time.<sup>2</sup> This is a serious deficit in our understanding of how EU

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<sup>1</sup> Karen Smith, "Western Actors and the Promotion of Democracy" in Jan Zielonka and Alex Pravda (eds.), *Democratic Consolidation in Eastern Europe, Volume 2, International and Transnational Factors* (Oxford: Oxford University Press, 2001): 31; Jan Zielonka, "Conclusions: Foreign Made Democracy" (ibid.): 511. For a survey of EU policy toward the CEECs in the 1990s see Karen Smith, *The Making of EU Foreign Policy: the Case of Eastern Europe* (New York: St. Martin's Press, 1998).

<sup>2</sup> For a discussion of EU conditionality generally, see Heather Grabbe, "How does Europeanisation affect CEE governance? Conditionality, diffusion and diversity", *Journal of European Public Policy*, 8,

conditionality operates in practice. The analysis presented here takes a process tracking approach to study the relationship of EU conditionality to changes in minority rights protection in the CEECs. The issue of minority protection is, we believe, the most extreme case for analyzing the problem of linkage between EU membership conditionality and compliance by candidate countries. The standard measure of compliance employed in studies of EU enlargement, the degree and pace of transposition of the *acquis de l'union*, is not useful since EU law is virtually non-existent, and EU practice is so divergent, in the policy area of minority protection. We examine how the EU's monitoring process operated, what its benchmarks were, how the EU process interacted with those of other international organizations, and evaluate what its impact was on the candidate countries.

We can best evaluate the methods employed by the EU to monitor minority protection in the CEECs by focusing on the role of the Commission. Enlargement was a policy task that was allocated to the Commission by the Copenhagen Council of 1993, requiring it to handle the negotiations and to monitor and report on the fulfilment of the accession conditions. We analyze the structure and content of the Commission's main instrument for monitoring progress on accession, the Regular Reports on the candidate countries. Then, we examine whether there is a plausible correlation between the Regular Reports and policy-making in the field of minority rights protection by CEECs.

## **II. Minorities in Transition**

The most widely employed paradigm for understanding the process of post-communist change is that of 'transition to democracy'. This approach to democratization stresses two key determinants. Firstly, long-term structural development through modernization.<sup>3</sup> Secondly, contingent actor-related strategies and elite bargaining.<sup>4</sup> The effect of other types of cleavages, such as ethnicity and

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6: 1013-1031. For a study of the inconsistencies of EU conditionality towards non-CEEC third countries see Karen Smith, "The EU: Human Rights and Relations with Third Countries" in Karen Smith and Margot Light (eds.), *Ethics and Foreign Policy* (Cambridge: Cambridge University Press, 2001): 185-203.

<sup>3</sup> Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (Baltimore: Johns Hopkins University Press 1983, revised edn) and "Social Requisites for Democracy Revisited", *American Sociological Review*, February 1994: 1-22.

<sup>4</sup> John Higley et al, "Introduction: Elite Change and Democratic Regimes in Eastern Europe" in John Higley et al. (eds.), *Postcommunist Elites and Democracy in Eastern Europe* (London: Macmillan

religion, are not prominent factors of analysis in the conventional transition paradigm, if they are considered at all. When transitology does address the issue of minorities, their presence in a transition state is viewed as a major obstacle to democratization.<sup>5</sup> Some studies argue that minorities represent a challenge to democratizing nation-states that has serious potential for political instability and, consequently, are best managed by centralization and assimilatory policies.<sup>6</sup>

Multiculturalism and multi-ethnicity are also viewed, more generally, as a significant issue for the political stability of nation-states. The potential for instability, perhaps leading to the worst possible outcome of violent secession, is particularly associated with the presence of territorialized minorities. Much of the research on national and ethnic conflict suggests that such deeply divided societies can be stabilized by institutional designs which accommodate diversity. Rights derived from belonging to a distinct minority group can be protected by a range of institutional legal and political mechanisms, for example, by federal, consociational or some hybrid form of institutionalized power-sharing.<sup>7</sup> The acceptance of 'group-specific' cultural and linguistic rights, power-sharing arrangements, and socio-economic rights is seen as central to the accommodation between minorities and majorities in democratic states, but such policies are often highly contested and controversial.<sup>8</sup> Much depends on whether minority groups are territorialized or non-territorialized, are fully located within borders or straddle the borders of more than one state, and are politically mobilized or passive.

Minority protection has a significant historical resonance for many CEECs. Minority management, whether by genocide, expulsion, coercion or accommodation

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Press, 1998): 1-33; Adam Przeworski, "The Games of Transition" in Scott Mainwaring et al. (eds.) *Issues in Democratic Consolidation. The New South American Democracies in Comparative Perspective* (Notre Dame, Ind.: University of Notre Dame Press, 1992): 105-52.

<sup>5</sup> Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: John Hopkins University Press, 1996): 16-37.

<sup>6</sup> David Laitin, *Identity in Formation. The Russian-speaking Populations in the Near Abroad* (Ithaca: Cornell University Press, 1998).

<sup>7</sup> Arend Lijphart, *The Politics of Accommodation* (Berkeley and Los Angeles: University of California Press, 1968).

<sup>8</sup> See Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley, LA: University of California Press, 1985): 563-652; John McGarry and Brendan O'Leary, "Introduction: The macro-political regulation of ethnic conflict" in John McGarry and Brendan O'Leary (eds.), *The Politics of Ethnic Conflict Regulation. Case Studies of Protracted Ethnic Conflicts* (London: Routledge, 1993): 1-40; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995); Will Kymlicka and Magda Opalski (eds.), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press, 2001).

is intrinsic to the historical emergence and development of many of these states, whose foundation was Wilsonian selective self-determination in the period after the peace treaties ending World War One in 1919-20.<sup>9</sup> In fact, policy practice after 1989 in the CEECs varied, depending on the size of the minority, its location and resources, the history of relations between majority and minority groups, the constitutional design of the new regime and the nature of its transition path. In most states, minority protection was a second-order issue at the outset of transition in the CEECs as these states prioritized the strengthening of central state capacity and the position of the majority nation. What factors, then, drove the development of new minority protection regimes in the CEECs during the 1990s?

### **III. The Indefinite Minority in International Norms**

The resurgence of a rights agenda for minority protection in Europe is largely the result of two interconnected historical processes of the late 1980s and early 1990s. Firstly, the collapse of communism in 1989-91 reactivated and significantly empowered the pan-European institutions for regulating inter-state relations and monitoring the normative agenda defined by the Helsinki Final Accords. The Conference for Security and Cooperation in Europe (CSCE) established at Helsinki had been largely ineffective in the pursuit of the 'rights' agenda defined by the Final Accords due to opposition from the states of the Soviet bloc to its interference in their internal affairs. In any event the concept of 'minority' rights had been discredited by the politics of the inter-war era and the failure of the League of Nations, and was abandoned in favour of a new 'universalism' to promote individual human rights after 1945. The Helsinki process had affirmed the formulation of preceding European and international standards relating to human rights by attaching them to 'persons' rather than 'groups'. The end of communism created a new opportunity for the enforcement of a transnational rights regime in Europe. The reinvigoration of the CSCE process after 1989 legitimated it as a powerful monitoring mechanism in the regulation of

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<sup>9</sup> For a general history that is sensitive to the issue of minorities in Eastern Europe see R. J. Crampton, *Eastern Europe in the Twentieth Century – and After* (London: Routledge, 1994). For a discussion of the role of minority issues in the international relations of Europe in the twentieth century see J. Jackson-Preece, *National Minorities and the European Nation-State System* (Oxford: Oxford University Press, 1998): 17.

state conformity with declared core European norms of democracy, human rights and minority protection.<sup>10</sup>

The new European norms on minority protection that emerged in the aftermath of the collapse of communism reflected a continuity with international precedents on minority protection. The concept of ‘minority’ (and its antonym ‘majority’) in international relations is as poorly defined today as when its use was first legitimated at Versailles in 1919. There is no agreed legal, or indeed conceptual, definition of what constitutes a national ‘minority’.<sup>11</sup> There is a ‘babble of international instruments’ the ambiguities and contradictions of which reflect the underlying tension in them between universal individual rights (i.e. human rights) and ‘group-specific’ or differentiated rights for minorities.<sup>12</sup>

Despite the lack of international consensus on what constitutes a national minority and how minority rights should be safeguarded, the principle or ‘norm’ of minority protection was rhetorically prominent in how external and internal actors evaluated state-building and democracy in the CEECs after the fall of communism. Indeed, the salience of ‘minority’ rights was accentuated sharply in the international agreements after 1989. The tension between advocates of a traditional concept of sovereignty, embodied in the rights of states, and those countries that favoured a reformulation of

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<sup>10</sup> Helsinki Final Act, Principle VII, par. 4: <http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm> and chapter 4 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 5-29 June 1990: <http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm>.

<sup>11</sup> See Jackson-Preece: 9-17, 21, 27-9.

<sup>12</sup> See Patrick Thornberry, “An Unfinished Story of Minority Rights” in Anna Mária Bíró and Petra Kovács (eds.), *Diversity in Action: Local Public Management of Multi-Ethnic Communities in Central and Eastern Europe* (Budapest: LGI Books, 2001): 47-73 at 48, and his *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991). The international minimum standards for minority protection of UN agreements are vague. For example, Article 27 of the International Covenant on Civil and Political Rights (1966), assigns rights to “persons (authors’ emphasis) belonging to ... ethnic, religious or linguistic minorities” and states that they shall not be denied the right “in community with the other members of their group, to enjoy their own culture, ... practise their own religion, or to use their own language”. In contrast, the Deschenes definition, used in a non-binding UN declaration of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (1985), referred to those who are “a group of citizens of a state”, being “a numerical minority”, and have “ethnic, religious or linguistic characteristics which differ from those of the majority”, exhibit “a sense of solidarity” and have the aim “to achieve equality with the majority in fact and in law”: UN Doc. E/CN.4/Sub.2/1985/31 (1985). The UN Declaration on the Rights of Persons Belonging to the National, Ethnic, Religious or Linguistic Minorities (1992) stipulates the right “to participate effectively in cultural, religious, social, economic and public life” (Art.2.2) at the national and, where appropriate, at the regional level (Art.2.3).

sovereignty that included an obligation of minority protection, first surfaced at the CSCE Copenhagen meeting in 1990.<sup>13</sup>

The second development was that the EU (then EC) was redefining itself as a more political union. Subsequently, the newly restated pan-European normative commitment to these core norms was entrenched by the EU in its road map for EU enlargement to the east. The basic conditions for new members established by the declaration of the June 1993 Copenhagen Council (the ‘Copenhagen criteria’) borrowed from the existing OSCE norms on the need for democratic states to guarantee human rights and protect minorities. The EU drew from the OSCE and the Council of Europe norms because it considered them to be the best practice of ‘international standards’. Yet, even by this stage, prior experience had demonstrated that the power of both organizations to ensure compliance was relatively weak. In very exceptional circumstances, the Committee of Ministers of the Council of Europe, in consultation with the Parliamentary Assembly (PACE), can suspend member states for infringements of its statutes.<sup>14</sup> The norms of behaviour for member states are disseminated through the detailed and regular exchanges between the Advisory Committee and the national governments. Moreover, internationally binding agreements made in the aftermath of the collapse of communism in Europe, including the Council of Europe’s Framework Convention for the Protection of National Minorities (1995) (FCNM), restated the pre-existing fudge in international relations. The FCNM provided no definition of ‘national minority’ and tied rights and protection to ‘persons’ belonging to minority groups.<sup>15</sup> The ambiguities were

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<sup>13</sup> The discussions on minority protection saw the breakdown of the ‘east-west’ divide of the Cold War era as Hungary joined countries such as Germany, Austria, Italy, Netherlands and Canada in arguing for recognition of collective minority rights to autonomy, while Slovakia, Romania, and Bulgaria supported the traditional statist positions of France and Greece.

<sup>14</sup> So far, no state has been suspended. The threat of suspension has only ever been applied seriously against Greece, Turkey and Russia. In December 1969, the military dictatorship in Greece withdrew from Council of Europe membership when threatened with suspension. Turkey has been regularly threatened with suspension for human rights violations. In response to Russia’s flagrant violations of Council Of Europe obligations during the war in Chechnya its voting rights were suspended by the Parliamentary Assembly in April 2000 but the Committee of Ministers rejected the suspension of membership. Russia’s voting rights were restored in January 2001. Also, membership of the Council of Europe was refused to the Former Republic of Yugoslavia during the Milosevic regime, and the special ‘guest status’ of Belarus was suspended in January 1997.

<sup>15</sup> For example, the preamble states that a “pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity”. There is a potential contradiction in Art. 1 which refers to the “protection of national minorities” as opposed to “persons” belonging to them. The ambiguity in the text has led to many signatories adding their reservations and declarations in which they provide their own definitions of a national minority. For the document see <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>.



replicated in the key OSCE General Recommendations issued in the 1990s, thus reflecting the multiple compromises necessary to achieve the establishment of a baseline of international minimum standards.<sup>16</sup> The strength of both the FCNM and the General Recommendations, however, is that they are pan-European instruments specifically designed to address the issue of minority protection.

Similarly, the effectiveness of the OSCE lies in its capacity to ensure the compliance of states through, in particular, the activities of the office of the High Commissioner on National Minorities (HCNM), established in 1992 as an ‘early warning’ and ‘early action’ mechanism to manage minority issues and prevent conflict. Much depends on the skills and influence of the person who holds the office of HCNM and the extent to which their activities are proactive or passive. The effectiveness of the HCNM in promoting the protection of minorities during the 1990s has largely been attributed to the dynamism and persistence of the ‘quiet diplomacy’ of its then head Max van der Stoep. In the absence of legal enforcement power, the HCNM must rely on proactive quiet diplomacy, and when necessary be prepared to ‘name and shame’ those countries which do not comply with the agreed standards.

#### **IV. EU Norms and Minority Protection: Liberal Aims and Collective Goals**

The end of communism in Central and Eastern Europe was a catalyst for the contemporaneous processes of the deepening of the EU as a political union based on common values beyond the regulation of an internal market, and its eastward enlargement. The formulation by the EU of the conditions for membership for the former communist states of Central and Eastern Europe, as set out by the Copenhagen Council of 1993, marked a significant disjuncture from its previous approach to political norms in one key respect – that relating to minority protection. The first Copenhagen criterion stated that: “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, human rights, the rule of law and respect for and protection of minorities”.<sup>17</sup> The Copenhagen criteria reformulated principles that had been persistently advocated by the democracies of Western Europe during the Cold War as international standards to which the

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<sup>16</sup> Specifically, the Hague Recommendations on the Education Rights of National Minorities (1996), the Oslo Recommendations on the Linguistic Rights of National Minorities (1998), and the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999): <http://www.osce.org/hcnm/documents/recommendations/index.php3>

<sup>17</sup> See <http://europa.eu.int/comm/enlargement/intro/criteria.htm>

Communist states should be held to account. This norm-oriented tension in the international relations between the two parts of a divided Europe can be traced from the Helsinki Final Act (1975) through to the agreement on a pan-European system of political norms set out by the Copenhagen Meeting of June 1990 and the Paris Charter. The latter dropped the ‘persons’ formulation and instead referred to minority protection in the following terms: “peace, justice, stability and democracy, require that the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created.”<sup>18</sup> The shift to a ‘group rights’ formula was also apparent in the Opinions of the Badinter Arbitration Committee, which was established by the EU in August 1991 to provide a legal view on how the dissolution of Yugoslavia should be managed. Its emphasis on the rights of ‘peoples and minorities’ was affirmed by the EU Foreign Ministers’ Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union and the Declaration on Yugoslavia of 16 December 1991, which made recognition conditional upon, amongst other things: “guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE”.<sup>19</sup>

The shift in legal terminology reflected a much more profound conceptual shift in European and Western policy thinking in response to nationalist mobilization and the dissolution of multi-ethnic communist states. Consequently, when the Copenhagen criteria of 1993 also dropped the conventional ‘persons’ formulation of international agreements in preference for a ‘group’ rights approach for minority protection, it was a further confirmation by the EU of its support for the policy paradigm developed by the Paris Charter and the Badinter Commission for dealing with the post-communist states. It was, moreover, of great symbolical significance in that the ‘group’ rights of minorities were now included as part of the menu of preconditions for EU membership. Thus, a much higher standard of norm compliance was set for the new candidates than the EU had ever been able to agree on internally for its own member

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<sup>18</sup> Conference for Security and Co-operation in Europe, 1990 Summit, Paris 19-21 November 1990 Charter of Paris for a New Europe. The text cited is in the ‘Human Dimension’ section. <http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm#Anchor-Huma-3228>

<sup>19</sup> In its first opinion, the Badinter Committee advised that the successor states to Yugoslavia must abide by “the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities”. For the full text see Alain Pellet, ‘The Opinions of the Badinter Arbitration Committee: A Second Breadth for the Self-Determination of Peoples; and *ibid.*, Appendix: Opinions No. 1, 2 and 3 of the Arbitration Committee of the International Conference on Yugoslavia’, *European Journal of International Law*, 3, 1, 1992, 178-185.

states. It was a peculiar combination of claims from two standpoints. Firstly, it attempted to reconcile two competing views of liberal democracy: one emphasizing the procedural essence and commitment to equal respect and neutrality (democracy, the rule of law, human rights), the other encapsulating a collective goal of recognition of group differences and rights (respect for and protection of minorities).<sup>20</sup> Secondly, given that there was no standard for the recognition of the ‘group’ rights of minorities within the EU, and the practice of member states is highly asymmetric, the legal foundation for such political norms was very thin.

The bulk of the approximately 80,000 pages of what is now the *acquis de l’union* concern economic and administrative regulation and law. Prior to the Treaty of Maastricht (1992), the EU had an internationalized indirect conditionality of certain minimum standards of human rights and treatment of minorities for new members. The tripartite Council-Commission-European Parliament Declaration on Human Rights of 1977 had required all EU candidate states to be parties to the European Convention on Human Rights (ECHR) of 1950 and to accept the right of individual petition under it. Since the ECHR was open only to members of the Council of Europe, an indirect link was established between EU membership and membership of the Council of Europe. Since the Council of Europe verified its members’ constitutions, laws on human rights and record on minorities, it performed a prior screening for EU candidates.<sup>21</sup> Thus, the principle for the EU to borrow and draw on other international organizations for standard-setting, evaluating and benchmarking the candidates was in place prior to the enlargement process.

The Treaty of Maastricht entrenched, for the first time in the history of the EU, specific provisions on fundamental rights, but its only provision relating loosely to minorities amounted to a vague recognition of the requirement that member states respect “national and regional diversity” (Article 151).<sup>22</sup> Other EU and European institutions also had an impact on the development of policy on minorities during the 1990s. The European Parliament tended to perform a ‘showcasing’ role for the EU during the early 1990s, by passing numerous resolutions on human rights and

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<http://www.ejil.org/journal/Vol3/No1/art12-02.html>.

<sup>20</sup> The Copenhagen criteria emerged at a time when the traditional understanding of the core common values of western liberal democracies was being challenged by proponents of multiculturalism. We have no direct evidence that the academic debates shaped the policy making behind the Copenhagen criteria, but it is a plausible assumption. For the debates see Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994).

<sup>21</sup> Jackson-Preece: 51.

minority protection. This was a kind of declaratory politics, however, that was rarely translated into ‘mainstream’ policy. There is also a trend for ‘burgeoning jurisprudence’ on the issue of minority rights protection in the European Court of Human Rights (ECHR).<sup>23</sup> The court, however, has limited powers to ensure compliance by signatory states and while it may award compensation to plaintiffs it has no power to change law within the states concerned. Its case law, nevertheless, is increasingly being interwoven with the legal and political fabric of the advanced democracies in Europe. A more important dimension is whether the process of judicial review and judicial activism in the EU’s Court of Justice will also gradually develop a body of legal precedents on human rights. After all, human and minority rights do not represent mutually exclusive categories. Minority rights are best conceived of as human rights plus specific rights targeted at national minorities. Some aspects of human rights protection, for example laws against discrimination and guaranteeing equal opportunities, are entrenched in chapters of the *acquis*, and may be utilized to provide minority rights protection also. So far, however, the member states and the Commission appear to be opposed to any codification of minority protection into EU law.

The tension between the liberal individualist norms (and the ‘persons’ formula) and communitarian norms (and the denominator ‘groups’) in relation to minority protection is confirmed in the development of EU treaty law in the Treaty of Amsterdam (1997) (TEU) and the Treaty on the European Communities (1997) (TEC). Where the TEU expressed the ‘common values’ of member states, it incorporated all of the values set out by the EU in the first Copenhagen criterion, which are defined in Article 6 (1) as “liberty, democracy, respect for human rights and fundamental freedoms and the rule of law”, but expressly excluded “respect for and protection of minorities”. That Article 6 (1) draws on the Copenhagen criteria is specifically alluded to in Article 49, which specifies that the principles laid out in Article 6 (1) are preconditions for any state applying for EU membership.<sup>24</sup> There is a clear contradiction between the TEU and the first Copenhagen criterion, but the TEU

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<sup>22</sup> The Treaty of Maastricht (1992), Article 151: <http://europa.eu.int/abc/obj/treaties/en/entoc01.htm>.

<sup>23</sup> See Geoff Gilbert, “The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights”, *Human Rights Quarterly*, 24, 3, 2002: 736-780. For example, see the case *Gorzelik and Others vs. Poland*, 44158/98, Eur. Ct. Hum. Rts. (Fourth Section), 17 May 2001. In the case of *Chapman vs. United Kingdom*, 33 Eur. Hum.Rts. Rep. 18, 129 (2001), the Court recognized that the traditional lifestyle of the Roma should be protected.

is legally binding and, therefore, clarifies that the EU has abandoned the minority protection provision of the conditionality for membership. The TEC also includes a new Article 13 which enables the European Council to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. This provision could become the basis for minority protection, though indirectly, and depending on constructive interpretation by the Court of Justice. The anti-discrimination provisions in the TEC and a Council directive of June 2000, once it is transposed into domestic legislation, will legally embed the norm of “equal treatment between persons irrespective of racial or ethnic origin”.<sup>25</sup> We should note, however, that once again the protections are to be enjoyed by ‘persons’ not ‘groups’ and there is no mention of ‘nationality’ or ‘national minority’. The use of the much broader term ‘ethnic origin’, however, means that there is some scope for minority protection even if the directive was not conceived for this purpose, but only if so interpreted by the judges of the Court of Justice. The EU legal terminology suggests that at the very least a shifting standard, if not a double standard, is at work. The protection of minorities as ‘groups’ appears to be understood by the EU in 1993 as Central a norm that should be implemented by candidates for membership, overwhelmingly at this time from the ex-communist CEECs, but not by member states.<sup>26</sup> By the time of the TEU in 1997, however, this norm had been abandoned in law for future candidates, though it retained its rhetorical prominence in the enlargement process. Confusion of norms is also evident in the EU’s Charter of Fundamental Rights (2000), which includes “membership of a national minority” in its non-discrimination clause, but also prohibits “any discrimination on grounds of *nationality*” (our italics), and affirms that the Union “shall respect cultural, religious and linguistic diversity”.<sup>27</sup> The experience of the accession of the CEECs and the

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<sup>24</sup> Consolidated Version of the Treaty on European Union (1997), Art. 6 (1), Art. 49: [http://europa.eu.int/eur-lex/en/treaties/dat/eu\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf).

<sup>25</sup> Treaty on the European Communities (1997), Art. 13: [http://europa.eu.int/eur-lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf); Council Directive 2000/43/EC of 29 June 2000: OJ L 180, 19.07.2000.

<sup>26</sup> As Bruno de Witte put it, for the EU the concept of minority protection appears to be “primarily an export article and not one for domestic consumption”, Bruno de Witte, “Politics versus Law in the EU’s Approach to Ethnic Minorities” in Jan Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union* (London: Routledge, 2002), 464-500 at 467.

<sup>27</sup> Charter of Fundamental Rights of the European Union, Art. 21(1) and (2), and Article 22. The preamble is also potentially contradictory in its claim that the Union respects the “diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States...”: <http://ue.eu.int/df/default.asp?lang=en>. For a discussion of the legal and political norms that

development of the Charter demonstrate that the discourse swell on minority rights that enveloped the EU in the middle of the 1990s dissipated the closer the reality of accession loomed. On the whole, the Charter embraces the liberal individualist norms that permeate the *acquis*, and consequently, the development of a codified group-specific approach to rights within the EU seems highly unlikely in the near future.

As we have seen, the EU conditionality as set out in the ‘Copenhagen criteria’ is inherently strong on the normative intent and drive for compliance and convergence but substantively it is weakly defined and poorly elaborated. This creates dilemmas for both the EU and the candidates in determining how and when conditions have been satisfied. The baseline conditionality for the candidates is represented by the adoption of the *acquis de l’union* into domestic law, a condition that can be monitored and evaluated in a relatively straightforward manner by examining whether a requisite law exists, and whether it conforms to EU stipulations. Some of the Copenhagen criteria are more easily correlated with EU legal requirements than others. For example, the condition that they have “fully functioning market economies” may be straightforwardly correlated with the adoption of certain chapters of the *acquis*. The political concepts and standards prescribed by the other conditions that require aspiring members to be democracies and operate according to the rule of law and respect human and minority rights are not so readily translatable into specific chapters of the *acquis*. There is also, however, a higher order dilemma of ‘implementation’. A law can exist formally but may not be implemented in part or in whole because of deliberate non-compliance, or because of ‘capacity’ weakness in candidate states that are resource stretched, if not poor, and lack experience of the kind of jurisprudence that characterizes democratic states with market economies. In fact, the EU has shifted its emphasis over time during the accession process from the adoption of the *acquis* to implementation and capacity issues.

The paradox of the EU attempting to enforce minority rights protection on states outside the EU, while foregoing it for its member states raises commitment and compliance dilemmas of three main types. Firstly, of all the ‘Copenhagen criteria’, minority rights protection is the most weakly defined by the EU as it lacks a clear foundation in law, and there are no established EU benchmarks. This absence of

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inform the Charter see Guido Schwellnus, “‘Much Ado About Nothing’: Minority Protection and the EU Charter of Fundamental Rights”, ConWEB No 5/2001:  
<http://www.les1.man.ac.uk/conweb/papers/conweb5-2001.pdf>

content is the essence of the EU's policy commitment problem. Secondly, the EU's priorities are evident from the fact that its own mechanisms for enforcing and monitoring compliance on minority protection in the candidate countries are very weakly developed compared with other areas of the *acquis*. Consequently, the EU tends to rely on proxies (primarily external bodies such as the Council of Europe, OSCE, and NGOs) to perform the monitoring functions. Thirdly, commitment to minority rights is weakened by the fact that it is a concept that is deeply disputed in international politics, with few generally accepted standards, and even, as noted earlier, confusion over the very definition of the term 'minority'. Within the EU itself, the practices of member states vary widely, ranging from elaborate constitutional and legal means for minority protection and political participation, such as language rights, autonomy or consociational quota arrangements, to constitutional unitarism and denial that national minorities exist.<sup>28</sup> Policy on minority protection is wholly within the remit of the national governments and outside the influence of the Commission and the Court of Justice. The combined effect of vague and contested international standards, the diverse approaches of member states, and the weak influence of the Commission and the Court in this policy area, strengthen the perception on the part of the candidates that the Copenhagen criteria were a grand EU double standard. This perception weakened their commitment and compliance. In the absence of clear benchmarks on minority protection, how did the EU proceed with the monitoring and reporting in this area?

## **V. EU Regular Reports and the Formulae for Minority Protection**

When the EU began to systematically monitor the accession process of each candidate from 1997 through bilateral negotiations (and the closing of chapters), and the regular 'progress' Reports on the candidate countries, two main methods were employed to monitor the compliance with the 'Copenhagen criteria': firstly, the candidate's domestic process of legislative engineering was evaluated to test for the adoption of the requisite laws; secondly, systemic adaptation was monitored by assessing implementation and the 'capacity' of the candidates to meet the obligations of

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<sup>28</sup> France, as an 'indivisible' republic, does not recognize the existence of national minorities, though it has permitted linguistic autonomy in Corsica, nor does Greece. Nevertheless, the trend is for their positions to be referred within the EU as 'the French and Greek exceptions', itself an indication of a deeper convergence on ideas about best practice in the management of minorities. Many EU member states have complex constitutional systems for regulating relations between national groups and minorities, including: Belgium, Spain, Italy, Finland, and the UK (N. Ireland).

membership. The Commission's annual Regular Reports, following on from the Opinions of 1997 and the Accession Partnerships, have been the EU's key instrument to monitor and evaluate the candidate countries' progress towards accession. While the Reports are one of several channels of interaction between the Commission and the CEECs, they are the key instrument by which the Commission has both identified the EU's own priorities and concerns, and disseminated them to the CEECs. The Reports also indicate the main trends and results in the field of minority protection within the CEECs. The Reports have a formulaic structure, which broadly applies the Copenhagen criteria, and their common structure permits cross-country comparisons. When dealing with policies of minority protection the structure of the Reports has four main elements.

Firstly, although eight of the ten CEECs have significant minority populations (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Romania and Slovakia), the conditions of only two minority groups are consistently stressed in the Regular Reports. These two minority groups are: the Russophone minority in Estonia and Latvia, and the Roma minorities of Bulgaria, the Czech Republic, Hungary, Romania and Slovakia. Two other sizeable minority groups (the Hungarians of Romania and Slovakia, and the Turks of Bulgaria) are mentioned in the Reports, though considerably less attention is paid to them than to the previous two groups. Secondly, the Reports are organized in such a way as to review each candidate country according to "the rate at which it is adopting the *acquis*", a stipulation laid down by the Luxembourg Council of December 1997.<sup>29</sup> Since, as we noted earlier, the political aspects of the Copenhagen criteria are not translatable into particular sections of the *acquis*, this suggests that the main objective of the Reports was to accelerate the economic integration of the candidates by their speedy adoption of the *acquis*, rather than to seriously monitor their progress on the broadly stated normative conditions of the Copenhagen criteria. Thirdly, the introduction to the first Reports states that it is the EU's priority "to maintain the enlargement process for the countries covered in the Luxembourg European Council conclusions". This wording suggests that harsh criticism of the 'Luxembourg six' was to be avoided and progress along the 'road map' sustained. Fourthly, the Reports are, in essence, a compendium of results compiled from a variety of EU sources and drawing on information provided directly

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<sup>29</sup> European Council, Luxembourg, 12-13 December 1997, Presidency Conclusions. <http://ue.eu.int/Newsroom/LoadDoc.asp?BID=76&DID=43659&from=&LANG=1>



by the candidate countries, the Council of Europe, the OSCE, International Financial Institutions and NGOs, as well as “assessments made by Member States”, especially in the political sphere. The lack of transparency in the process of compilation by the EU makes it impossible to measure the relative weight of each of these inputs.

The Reports illustrate that the EU lacks clear benchmarks to measure progress in the field of minority rights protection. The emphasis is on acknowledging the existence of formal measures rather than the evaluation of implementation. For example, the Reports track and note the adoption and change of laws critical for minority protection (principally on citizenship, naturalization procedures, language rights, and electoral laws), the establishment of institutions that manage minority issues (whether within government ministries, in parliaments or at the local government level), and the launch of government programmes to address minority needs. Trends are evaluated by numerical benchmarks, such as the number of a minority granted citizenship, number of requests for naturalization, the pass rate for language or citizenship tests, the number of school or classes taught in the state and minority languages, the number of teachers trained to teach in the state and minority languages, the extent of media and broadcasting in minority languages, and so on. In essence, the Reports are a patchwork of formulaic expressions and bureaucratic codes to encapsulate ‘progress’ by the CEECs on the ‘road map’ to membership. For example, the general commitment of the CEECs to improve minority protection is often taken at face value and described in positive terms, including formulations such as: “continuing commitment to the protection of minority rights”, “a number of positive developments”, “significant progress”, “considerable efforts”, “considerable progress”, “consolidating and deepening ... the respect for and protection of minorities”.<sup>30</sup> Some candidate countries merit sweeping generic statements, such as that minorities are “well integrated into Hungarian society” that Hungary has a “well-developed institutional framework protecting the interests of its minorities and promoting their cultural and educational autonomy”.<sup>31</sup>

The structure and content of the Regular Reports are designed in a way that renders them a cumulative success story for each candidate country, and in particular for the ‘Luxembourg six’. Positive developments in many areas of public policy that relate to

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<sup>30</sup> Report on Romania, 1998: 12; Report on Romania, 2001: 29; Report on Slovakia, 1999: 16; Report on Slovakia, 2002: 33; Report on Estonia, 2000: 20; Report on Estonia, 2001: 23. The Reports are available at [http://europa.eu.int/comm/enlargement/index\\_en.html](http://europa.eu.int/comm/enlargement/index_en.html).

<sup>31</sup> Report on Hungary, 2001: 22; Report on Hungary, 2002: 30.

minorities are recorded, yet often the previous Reports had not specified any problems in these areas. Examples of this practice include the reference to the improvement of the “conditions for the use of minority languages, in particular Hungarian” in Romania’s 1999 Report, and the positive mention of media programmes in Turkish singled out in Bulgaria’s 2001 Report.<sup>32</sup> Thus, there is an absence of continuity and coherence in the EU’s monitoring mechanism as the Reports are characterized by ad hocism. The Reports do not systematically assess the structure and operation of institutional frameworks or policies for dealing with minority groups. In Romania’s 2002 Report we are told that the legislation on the use of minority languages in public administration is being “successfully applied despite the reticence of some prefectures and local authorities.”<sup>33</sup> No evidence is provided to substantiate the claim to success. Problems in the implementation of minority protection policy are generally tied to lack of funding, weak administrative capacity, understaffing and the low levels of public awareness in the CEECs.

An obvious issue of concern in assessing the Reports is how they privilege certain minority groups over others, and what explains the creation of this hierarchy of minorities by the EU. The emphasis on the Russophone and Roma minorities suggest that the EU is more concerned with its external relations with its most powerful neighbour and main energy supplier, and own narrow soft security migration problems, than with minority protection as a norm *per se*. This may explain the EU’s prioritization of stabilization and improvement of conditions for these minorities prior to accession taking place. Moreover, another striking feature of the Reports is the emphasis on the integration of minorities, to such an extent that it is plausible to argue that they indicate a preference for assimilation. Two types of integration are emphasized. Firstly, there is an emphasis on linguistic integration, which the Reports interpret as the need to make minorities proficient in the official state language. Secondly, the Reports emphasize the social and, to a lesser extent, the political integration of the Roma.

The “gap between policy formulation and implementation” is most explicitly and harshly criticized by the EU with reference to the Roma. In the first Reports on Bulgaria, Hungary, Romania and Slovakia, the Roma are the only minority issue commented on at all, despite the fact that there are numerically greater minority

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<sup>32</sup> Report on Romania, 1999: 18; Report on Bulgaria, 2001: 24.

<sup>33</sup> Report on Romania, 2002: 35.

groups in these countries.<sup>34</sup> The fact that the treatment of the Roma is harshly criticized even in these candidate countries which are recognized as continuing “to fulfil the political Copenhagen criteria” indicates that minority protection in general is not the EU’s main concern. Furthermore, the Roma, as a non-territorialized and politically marginalized minority, is a politically less sensitive group to focus on by comparison with territorialized and politically mobilized minorities, such as the Hungarians in Slovakia and Romania. The Roma face severe problems of systematic discrimination, political and social exclusion, segregation, and poverty, not only in the CEECs but also in member states. Policy remedies to these problems are generally deeply unpopular among majority and other minority groups.<sup>35</sup> EU and candidate countries sometimes appear to be jointly acting out a charade on Roma policy. For example, the 1999 Report on Bulgaria states that: “Significant progress was achieved concerning further integration of Roma through the adoption of a Framework Programme for ‘Full Integration of the Roma Population into the Bulgarian Society’ and establishment of relevant institutions at central and regional level”.<sup>36</sup> By what measure this formal adoption of a programme marks “significant progress” is not clear. Two years later, little of this programme had been implemented.<sup>37</sup> More lip-service can, therefore, be paid to the Roma issue by the CEECs without it raising political tensions about minority challenges to the territorial integrity of the state.

Rather than set out EU benchmarks on minority protection, the Reports resort to ambiguous references to ‘international standards’ or ‘European standards’, in particular in connection with the adoption of laws or their implementation. These ‘standards’ are never specified. Moreover, the use of the term ‘standards’ in the Reports is itself misleading, for as we observed earlier, there are no internationally recognized standards. The Reports routinely cross-reference the ‘recommendations’, activities, principles and documents of other international organizations, in particular, the Council of Europe and the OSCE. Again, this suggests that the EU is itself groping for international benchmarks that do not exist. At the same time, the

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<sup>34</sup> Other minority groups are only referred to in later Reports, for example: Report on Bulgaria, 1998; Report on Romania, 1999; Report on Hungary, 2001.

<sup>35</sup> See, for example, The OSCE *Report on the Situation of Roma and Sinti in the OSCE Area* (2000). The ‘Properties of Gypsy Marginality’ are discussed in Zoltan B  r  ny, *The East European Gypsies: Regime Change, Marginality and Ethnopolitics*. (Cambridge: Cambridge University Press, 2002) 62-64.

<sup>36</sup> Report on Bulgaria, 1999: 75.

particulars of the ‘recommendations’ are not specified. The use of international standards external to the EU in specific Reports on candidate countries is most evident in the case of Latvia and Estonia, where the Europe Agreements included requirements that they comply “*inter alia* with the undertakings made within the context of ... the Organization for Security and Cooperation in Europe (OSCE) – the rule of law and human rights, including the rights of persons belonging to minorities”.<sup>38</sup> The 1998 Report on Latvia, for example, states a specific acknowledgement that the Commission based its evaluations of Latvia’s citizenship and naturalization policies on the extent to which they complied with OSCE Recommendations.<sup>39</sup> The 1999 Report on Latvia asserts that: “Latvia now fulfils all recommendations expressed by the OSCE in the area of naturalization and citizenship”.<sup>40</sup> Yet, fresh concerns over the linguistic rights of the Russophone minority are expressed in the 2001 Report on Latvia which states that the EU is making “joint efforts” with the OSCE and the Council of Europe to establish guidelines for the new language law.<sup>41</sup> Not only do the Reports fail to explain the details of international benchmarking, they also fail, at a more fundamental level, to distinguish between the different bodies of the OSCE, in particular between the country Missions and the High Commissioner on National Minorities. The contents of the Reports also suggest that the EU relies on the OSCE for some basic information and data gathering activities that are essential to professional monitoring. For example, the 1998 Report on Estonia quotes OSCE data on the number of minority members who gained citizenship. Where OSCE data does not exist, the Reports simply report the unavailability of data, as for example with regard to the implementation of language legislation in Slovakia mentioned in its 2000-2002 Reports.<sup>42</sup> Apart from such bland and sparse statements, the Reports do not inform us about the nature of the EU’s collaboration with other international organizations. For example, how frequent are the contacts and are they systematized, and, if so, by what mechanisms?

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<sup>37</sup> For an analysis of the EU’s position on policy toward the Roma in Bulgaria see Iavor Rangelov, “Bulgaria’s Struggle to Make Sense of EU Human Rights Criteria”, EU Monitoring Accession Program, 1 October 2001, <http://www.eumap.org/articles/content/10>

<sup>38</sup> OJ L68 of 9.3.98: 3-4 and OJ L26 of 2.2.98: 3-4.

<sup>39</sup> Report on Latvia, 1998: 11.

<sup>40</sup> Report on Latvia, 1999: 17.

<sup>41</sup> Report on Latvia, 2001: 26.

<sup>42</sup> Report on Estonia, 1999: 13; *ibid*, 2000: 18; Report on Slovakia, 2000: 20; *ibid.*, 2001: 23; *ibid.*, 2002: 32.

The Reports suggest that the EU takes a flexible approach to the adoption of the FCNM and OSCE Recommendations and foster a perception that the EU seeks to shift responsibility from its own monitoring process by internationalizing the benchmarking of the CEECs with respect to minority protection. This is most clearly evident in the explicit encouragement to sign up to documents such as the FCNM – despite the fact that several EU member states have not done so. When Commission officials have been asked to explain how the monitoring process actually embodies the Copenhagen criteria with respect to minority protection, they replied by stressing the need for the candidates to ratify the FCNM as the main instrument for putting the criteria into practice.<sup>43</sup> In contrast, the adoption of the more controversial European Charter of Regional and Minority Languages is rarely mentioned.

While the EU appears to be content to stress the cases of compliance by the CEECs with international ‘standards’, incidences of weak or non-compliance are glossed over. Thus, for example, the 2002 Reports on Estonia and Latvia include the glaring contradiction that, on the one hand, the OSCE mission in these states closed in late 2001, including the official OSCE reasons for this decision, whereas on the other hand, the section of the Reports on minorities further highlights the EU’s continued concern. The Report on Latvia, for example, “urged” it to ratify the FCNM and noted EU and OSCE concerns over naturalization and effective political participation by minorities due to restrictive language laws, including the fact that Latvia had been found in breach of the ECHR during 2001, yet still concluded that “the country has made considerable progress in further consolidating and deepening ... respect for and protection of minorities”.<sup>44</sup>

Finally, there is the question of the targeting of the EU’s technical and financial assistance in the policy area of minority rights. It would be reasonable to assume that financial flows are an indication of prioritization. The main instrument for the design

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<sup>43</sup> EU Monitoring Accession Program, Open Society Institute, 2002: 18. The EU Accession Monitoring Program (EUMAP), an independent body monitoring the accession process, was set up in 2000 within the Open Society Institute. Its aim is to monitor governmental compliance with the political criteria for EU membership, as defined in the first Copenhagen criterion. Detailed reports on minority protection and judicial capacity in the ten CEECs were published in 2001 and 2002. The 2002 reports included reports on the five largest EU member states, thereby explicitly moving towards a monitoring framework for the post-enlargement period. The reports were prepared by independent experts in the countries monitored, reviewed by an international advisory board and by national roundtables including government officials, civil society organizations, minority representatives and intergovernmental organizations. EUMAP stands for both the protection from discrimination and the positive promotion of minority identity. See <http://www.eumap.org/reports/2002/content/07>

<sup>44</sup> Report on Latvia, 2002: 30-35.

and delivery of the EU's policy on technical and financial assistance to the CEECs is the PHARE programme, established in 1989 and reoriented to address the accession priorities set by the EU for the CEECs in 1997. The official report on PHARE during the critical decade of the 1990s reveals that assistance in the policy area of minority rights was not a priority for the EU. Indeed, PHARE did not even have a separate budget line for assistance in the policy area of minority protection. We may assume that PHARE's activities to promote best practice in minority protection is subsumed under its activity heading 'civil society and democratization'. An indication of the priority attached to this policy area by the EU is that it accounted for just approximately 1 per cent of the total PHARE funds distributed in the CEECs. There is no information available as to how much of that minimal amount was targeted on minority protection.<sup>45</sup>

## **VI. Following the EU Script? Policy Outcomes in the CEECs**

Four core attributes generally frame the analysis of minority issues in the CEECs. Firstly, the definition of a national minority is hinged on ethnicity and a range of cultural markers (for example, language, religion, custom). In particular, in the CEECs it is the issue of minority language use that has been most widely contested. This involves a complex web of usage rights, for example in public administration, official contacts, the registering of names in minority language form, toponyms, education (at primary, secondary and tertiary levels), access to the media, and political participation more broadly. Many of these issues are covered in the FCNM. It is important to note, however, that this issue is not a problem of transition, but has deep historical roots in the region. The debates in Slovakia (and Romania) over the use of minority languages in public administration can be traced to Habsburg policy debates and practice over 'official languages' (*Amtssprachen*). Secondly, one can distinguish between territorialized and non-territorialized minorities. In the CEECs, the main territorialized minorities are the Russophone minority of Estonia and Latvia, and the Hungarian minority in Slovakia and Romania, while the main non-territorialized minority is the Roma. Thirdly, historical legacies mean that the question of minority protection in the CEECs is a policy issue that has a significant transnational dimension not only *vis-à-vis* relations with the EU, but also because these minorities

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<sup>45</sup> PHARE Review, October 2000:

[http://europa.eu.int/comm/enlargement/pas/phare/statistics/commit\\_sector.pdf](http://europa.eu.int/comm/enlargement/pas/phare/statistics/commit_sector.pdf)

often straddle borders, have proactive homeland states to articulate and defend their interests, or, as in the case of the Roma, are active in migration and thus constitute a serious soft security issue for the CEECs and the EU itself. The issue of minority protection, consequently, cross-cuts several critical political dimensions: it is often a salient intra-state issue in the domestic politics of transition, it often involves inter-state bargaining, it is central to the inter-regional bargaining for accession to the EU, and it is a policy arena that is conducive to cross-border and international cooperation. Fourthly, there is no clear-cut international or European standard on the means for minority protection.

The decision calculus of the ruling elites in the CEECs over whether to comply with EU conditionality is shaped not only by their perceptions of how a particular decision to comply or not to comply may affect the accession process of their country, but is also shaped by the extent of any domestic mobilization by majority or minority groups. A major consideration for political elites in the CEECs is whether a decision or policy to protect minorities negatively impacts on their domestic standing. Thus policy decisions in the CEECs are constrained by EU top-down and domestic bottom-up pressures. The impact of the Regular Reports on the adoption of minority rights protection in the CEECs is very uneven. In some countries there is a direct correlation with EU pressures, in others there is little or no correlation, and in others still there is more of a correlation with pressures from other international bodies such as the OSCE, which may be interpreted as an indirect effect of EU pressure. Most important of all, it is difficult to gauge whether the EU had a script for the CEECs, in the sense of a regime or strategy of measures to be introduced to secure minority protection. The ad hocism of the Reports suggests that there was no EU script. Consequently, the political will and domestic resistance levels to the adoption of new norms vary across the CEEC region.

Several countries legislated for minority protection, or were in the final stages of so doing, *prior* to the Copenhagen criteria. Some of these were inclusive measures, providing for autonomy arrangements and privileged quotas of representation in national parliaments. For example, Hungary passed a law on 'The Rights of National and Ethnic Minorities' in 1993 that granted collective rights and cultural autonomy to thirteen recognized minorities.<sup>46</sup> In Hungary, in particular, the historical resonance of the Treaty of Trianon (1920) which left large Hungarian territorialized minorities in

other states (Slovakia, Romania, Serbia), meant that there has been immense political will in favour of minority protection. In Slovenia the law of October 1994 on ‘Self-Governing National Communities’ created territorial autonomies and a guaranteed seat in the national parliament for its ‘autochthonous’ Italian and Hungarian minorities.<sup>47</sup> Others were exclusive in their design. For example, Estonia’s law of October 1993 on ‘Cultural Autonomy for National Minorities’ was limited to Estonian citizens, thus excluding the vast majority of its national minorities in the Russophone communities who were denied citizenship.<sup>48</sup>

Matching the pattern of behaviour in EU member states, the CEECs have drawn selectively from European and international standards for minority protection. All ten CEECs have signed the FCNM. Almost all signed up shortly after the document was opened for signature on 1 February 1995, though the process of ratification and implementation has taken longer. Of the CEECs only Latvia has still not ratified the document. This early commitment to the implementation of the FCNM contrasts with some of the EU member states (Belgium, France, Greece, Luxembourg and the Netherlands) that have still not ratified it.<sup>49</sup> Many countries, however, that have signed and ratified the document have added special declarations and reservations to their ratification. This practice has been fairly evenly spread among EU member states and candidate countries. Among the CEECs, Bulgaria, Estonia, Poland and Slovenia have added special declarations. The Bulgarian declaration, for example, cautiously refers to “the policy of protection of human rights and tolerance to persons belonging to minorities” and stipulates that the ratification and implementation of the Framework Convention do not imply “any right to engage in any activity violating the territorial integrity and sovereignty of the unitary Bulgarian state, its internal and international

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<sup>46</sup> See [http://www.riga.lv/minelres/NationalLegislation/Hungary/Hungary\\_Minorities\\_English.htm](http://www.riga.lv/minelres/NationalLegislation/Hungary/Hungary_Minorities_English.htm)

<sup>47</sup> See [http://www.riga.lv/minelres/NationalLegislation/Slovenia/Slovenia\\_EthnicCommun\\_Slovene.htm](http://www.riga.lv/minelres/NationalLegislation/Slovenia/Slovenia_EthnicCommun_Slovene.htm) For a discussion of these and other cases of constitutional and legislative protections for minorities in the CEECs see Kinga Gál, “The Council of Europe’s Framework Convention for the Protection of National Minorities and its Impact on Central and Eastern Europe”, *Journal on Ethnopolitics and Minority Issues in Europe*, winter 2000: 1-14. In 2002 amendments to Slovenia’s local government act ensured that the Roma will have representatives in twenty local councils.

<sup>48</sup> [http://www.riga.lv/minelres/NationalLegislation/Estonia/Estonia\\_KultAut\\_English.htm](http://www.riga.lv/minelres/NationalLegislation/Estonia/Estonia_KultAut_English.htm). By excluding non-citizens, this definition excludes 25.7 per cent of the population of Estonia, the overwhelming majority of which is composed by minority groups. According to population data for 2000, Russians amounted to 29.61 per cent of the total population, of which only 16.8 per cent had Estonian citizenship. See Vadim Poleshchuk, “Accession to the European Union and National Integration in Estonia and Latvia”, ECMI Report No. 8, February 2001: [http://www.ecmi.de/doc/download/report\\_8.pdf](http://www.ecmi.de/doc/download/report_8.pdf)



security”.<sup>50</sup> Estonia’s declaration is concerned with specifying its own legal definition of ‘national minorities’, who are stated to be “citizens of Estonia who reside on the territory of Estonia; maintain longstanding, firm and lasting ties with Estonia; are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics; and are motivated by a concern to preserve together their cultural traditions, their religion or their language which constitute the basis of their common identity”.<sup>51</sup> Similarly, Poland’s declaration affirms that it recognizes as national minorities only those residing in the Republic of Poland who are Polish citizens. It also includes a reference to international agreements protecting “national minorities in Poland and minorities or groups of Poles in other States”.<sup>52</sup> Slovenia’s declaration limits its definition of national minorities to “the autochthonous Italian and Hungarian national minorities”, but also states that the provisions also apply to “the members of the Roma community, who live in the Republic of Slovenia”, while excluding its numerically largest minority group, the Croats.<sup>53</sup>

A much more controversial and less widely adopted instrument for minority protection is the Council of Europe’s European Charter for Regional and Minority Languages (ECRML). Although it was opened for signature in November 1992, several years prior to the FCNM, by 2002 only three of the ten CEE candidates (Hungary, Slovakia and Slovenia) had ratified it. All three countries ratified in the latter stages of the enlargement process, between 1998 and 2002, but they added specific, and rather complex declarations to it. The poor take-up of the ECRML among the CEECs demonstrates that the dynamics of EU enlargement have done little to speed up its adoption. Only one other candidate country (Romania) has signed, though not yet ratified it. The ECRML offers a menu of options that each signatory can choose from in making their declarations. This makes for a great deal of ambiguity in defining the differences between a regional and a national language.

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<sup>49</sup> Nine of the ten CEE candidate states signed the Framework Convention in 1995; Bulgaria followed in 1997. Belgium, Greece, Luxembourg and Netherlands have signed, but not ratified the Framework Convention. France has not even signed it. <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

<sup>50</sup> Bulgaria, Declaration of 7 May 1999.

<sup>51</sup> Estonia, Declaration of 6 January 1997.

<sup>52</sup> Poland, Declaration of 20 December 2000.

<sup>53</sup> Slovenia, Declaration of 25 March 1998. According to the 1991 census, there were 81,220 Serbo-Croat speakers, and 52,110 Croat speakers, but only 9,240 Hungarian speakers, 4,009 Italian speakers, and only 2,847 Romani speakers. See [http://www.ecmi.de/emap/slo\\_stat.html](http://www.ecmi.de/emap/slo_stat.html)

The Czech declaration, for example, lists the Croatian, German, Romanian, Serbian, Slovak and Slovene languages.<sup>54</sup> Slovenia's Declaration states that only the Hungarian and Italian languages "are considered as regional or minority languages".<sup>55</sup> Both the Czech and the Slovenian Declarations limit the number of provisions applied to the above-mentioned languages. Slovakia's Declaration confers the status of regional or minority language to Bulgarian, Croatian, Czech, German, Hungarian, Polish, Roma, Ruthenian and Ukrainian. However, it also establishes a hierarchy of languages according to which Hungarian, followed by Ukrainian and Ruthenian, enjoy more far-reaching rights, for example the availability of pre-school education in a particular language as opposed to the right to apply for this type of education. The Slovakian Declaration also stipulates that it defines the ECRML's term "territory in which the regional or minority language is used" as that provided for by Slovak law (see below) as those "municipalities in which the citizens of the Slovak Republic belonging to national minorities form at least 20% of the population".<sup>56</sup>

Nevertheless, after the introduction of the Regular Reports, the other CEECs have formally adopted government programmes to protect or integrate minority groups. Thus, in the first instance, we should distinguish between *protection* and *assimilation*, for the two processes are not synonymous. According to EUMAP's 2002 monitoring reports, Bulgaria, the Czech Republic, Hungary and Romania are committed to a comprehensive approach to minority protection, by policies to eliminate discrimination and actively promote minority identities.<sup>57</sup> In Estonia and Latvia minorities are perceived as threats to the dominant national culture and the political elites have generally preferred strategies that are designed to encourage the assimilation of minorities to the majority culture by institutionalizing a framework of incentives and sanctions to promote the use of the state language over minority languages.<sup>58</sup> Similarly, in Slovakia and Romania minority protection, and autonomy in particular, is associated with a challenge to national sovereignty, thus, creating immense pressures from the majority ethnic communities against the implementation of measures of minority protection.

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<sup>54</sup> Czech Republic, Declaration of 26 April 1995.

<sup>55</sup> Slovenia, Declaration of 4 October 2000.

<sup>56</sup> Slovakia, Declaration of 5 September 2001. See note 50 above.

<sup>57</sup> EUMAP, 2002: 18, 23.

<sup>58</sup> See Laitin (footnote 6 above) and Aina Antane and Boris Tsilevich, "Nation-Building and Ethnic Integration in Latvia" in Pål Kolstø (ed.), *Nation-Building and Ethnic Integration in Post-Soviet Societies: An Investigation of Latvia and Kazakhstan* (Boulder, Col.: Westview Press, 1999): 63-152.

EU influence on the adoption of 'race equality' norms in legislation has been traced in Bulgaria, the Czech Republic, Romania and Slovakia.<sup>59</sup> The process of transposing the *acquis* in this area into domestic law in the CEECs is, however, slow, and implementation of government enabling programmes is even slower. Delays are often attributed to the weak capacity of these states to deal with the issues (whether it be underfunding or lack of experienced staff). There is also, however, a normative content to capacity issues. As newly democratizing states, the CEECs have weak legal systems and judicial cultures that are unfamiliar with many of the norms being promoted by the EU and other international organizations. Moreover, there is often an absence of political will both within the CEECs and from the EU to go beyond the rhetorical or formal legal and institutional change when dealing with the issue of minority protection. Often the bodies responsible for the monitoring and implementation of minority protections, such as Ombudsmen, are themselves politically marginalized within many CEECs.<sup>60</sup>

At best EU conditionality made minority protection a salient issue in the political agenda of the CEECs, but the fact that the EU had little to offer in terms of clarifying the issue, substantive measures and policy practice, allowed historical domestic precedents to resurface. Two cases are particularly illustrative of the impact of the Reports as an instrument of conditionality. An example of the strong impact of the Reports is the adoption of Slovakia's language law of July 1999, which is closely correlated with the pressures from the EU accession process. The language law (and Romania's 'Law on Public Administration' of April 2001) allows the use of minority languages in local public administration subject to a minority population threshold of 20 per cent in a given area.<sup>61</sup> This practice, and indeed threshold level, is derived not from recent European or international 'standards' but is derived from the Habsburg and post-World War I minority rights regimes in Europe. The threshold was first entrenched as a general standard in the founding principles and the enabling laws of

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<sup>59</sup> EUMAP, 2002: 24.

<sup>60</sup> EUMAP, 2002: 25.

<sup>61</sup> See Art. 2(1) Law on the Use of Minority Languages, 11 July 1999 (Slovakia): [http://www.riga.lv/minelres/NationalLegislation/Slovakia/Slovakia\\_MinorLang\\_English.htm](http://www.riga.lv/minelres/NationalLegislation/Slovakia/Slovakia_MinorLang_English.htm); Art. 51 Law No. 215 on Local Public Administration 23 April 2001 (Romania): [http://www.riga.lv/minelres/NationalLegislation/Romania/Romania\\_LocAdm2001\\_excerpts\\_English.htm](http://www.riga.lv/minelres/NationalLegislation/Romania/Romania_LocAdm2001_excerpts_English.htm)

the new state of Czechoslovakia in the early 1920s. Such rights are legally bound to the proportion of minorities resident in a given district.<sup>62</sup>

The Slovak law was a direct response to EU and HCNM criticisms of the policies of the Meciar government which had passed laws in 1995 to punitively constrain the language rights of Hungarians and in 1996 to gerrymander redistricting so as to minimize the political strength of the minority even in areas where it constituted a numerical majority. The EU was repelled by the anti-reformist nationalism of Meciarism and, consequently, Slovakia was excluded from the first wave of candidates at the Luxembourg Council in 1997 and was sharply criticized in the Report of 1998. The defeat of Meciar in the 1998 election led to a grand governing coalition of moderate parties, including the Hungarian minority party (SMK), which prioritised the adoption of a new language law in advance of the Commission meeting of July 1999 to review accession. The new law placed Slovakia back into the first wave of the candidate countries and its 1999 Report declared that the requisite “significant progress” had been delivered, despite the fact that there were definitional ambiguities in the new law and a problem of legal precedence in the more restrictive provisions of the constitution of Slovakia of 1992.<sup>63</sup>

The position of the Roma is a striking illustration of how domestic pressures can override EU conditionality. Despite the EU’s self-interested and sustained concentration on the Roma issue in the Regular Reports, none of the strategies or state bodies set up to deal with this minority effected any substantive change in their political, social or economic marginalization over time. The policy failures and the weakness of the implementation of minority protection for the Roma is noted in several Reports. Slovakia was strongly criticized for the “gap between policy formulation and implementation” on the Roma issue in its 2000 Report, and again in its 2001 Report.<sup>64</sup> The implications of weak policy implementation is referred to only in the 2002 Report on Bulgaria, which obliquely notes that there are “signs of

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<sup>62</sup> Under the Habsburg system of local government, schools had to be provided for any linguistic group that constituted 20 per cent of the local population. The Framework Convention does not specify a threshold as Article 10.1 only stipulates that: “In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.”

<sup>63</sup> For a discussion of the interaction of Slovakia’s laws and EU pressures, see Farimah Daftary and Kinga Gál, “The New Slovak Language Law: Internal or External Politics”, ECMI Working Paper No. 8, September 2000: 1-71: [http://www.ecmi.de/doc/download/working\\_paper\\_8.pdf](http://www.ecmi.de/doc/download/working_paper_8.pdf)

<sup>64</sup> Report on Slovakia, 2000: 22; *ibid*, 2000: 31.

increased tension between the Roma and ethnic Bulgarians”.<sup>65</sup> The Roma issue is the most indicative of the limitations of the EU’s monitoring mechanism and the lack of a correlation between the Reports and an improvement in minority protection or their integration.

## **VII. Conclusion**

By 2004, the EU will enlarge to include eight of the ten CEECs. Will this process lead to a redefinition of European structures and norms for the management of minority protection? The TEU clarifies that, currently, minority protection is not one of the EU’s core political norms. The conditionality of minority protection imposed on the CEECs by the Copenhagen criteria has been superseded by law (the TEU) and, as we have seen from our analysis of the Reports, it has been largely rhetorical on the part of the EU. Rhetoric matters in politics, but the question is to what extent the frameworks set up during accession will be implemented. Will the entry of new member states, which have developed their legal frameworks for minority protection over several years, provide the EU with a new momentum to further elaborate the legal and political standards of minority protection? Some powerful member states, such as France, can be expected to oppose the strengthening of minority protection. Opposition is also likely to come from new member states, such as Estonia and Latvia, who have been reluctant to comply with OSCE Recommendations on minority protection during the past decade and regard their national minority problems as solved. Moreover, the OSCE, the key European organization that was in the vanguard of the efforts to expand minority rights in the 1990s is less active now. The prospects for a kind of ‘reverse conditionality’, where international organizations such as the OSCE and Council of Europe, together with the CEECs, infuse the EU with a new commitment to minority rights is, consequently, unlikely. This is not to say, however, that there will not be incremental changes in favour of minority protection. The FCNM offers one route for this. Another route could be the Court of Justice through a process of judicial review of human rights and anti-discrimination provisions, as opposed to a codification of minority rights.

What are the main scenarios for the post-enlargement period with respect to minority rights? Generally, the choice may be seen in terms of a contrast between the

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<sup>65</sup> Report on Bulgaria, 2002: 33.

status quo and the institutionalization of multiculturalism, between policies which will further embed individual rights or policies which will develop group-specific rights.<sup>66</sup> We term these policy options as *liberal consolidation* and *expanded multiculturalism*. To some extent, these alternate scenarios are related to the prospects for further enlargement of the EU. Should the EU enter a period of stabilization and integration as a union of twenty-five member states, a contraction of political norms into a form of consolidated liberalism, with an emphasis on individual rights, seems likely. If the EU continues to enlarge to the East, to the Balkans, Ukraine, and to Turkey, then a scenario of expanded multiculturalism, with an emphasis on minority group rights seems more likely as part of this process. Thus, if the EU continues to expand, then we can expect its role in minority protection to expand also, and this would refocus attention on the issue of minority protection within the EU itself. Indeed, the next states in the membership queue, the states in the Balkans, then perhaps Turkey and in an even more distant prospect, Ukraine, have serious failings in their records on human rights and minority protection. Enlargement to these states is likely to be an even more drawn out process than it has been for the CEECs, and consequently, there will be a renewed focus on all of the Copenhagen criteria as the entry conditionality.

Two further sets of consequences follow from the scenarios identified above. If the EU lapses into a phase of contraction in its minority protection agenda, the position of minorities in the new member states may deteriorate and destabilize some of these states. The potential for conflict involving the Roma minority has already been identified. Many of the CEECs lack the political and financial capacity to fully implement the legal frameworks put in place during the accession process. In the absence of a proactive EU and OSCE, even at the rhetorical minimum level, the new members lack the external incentives and sanctions to continue with the implementation of minority protection policies, never mind further develop them. As the enlargement process terminates, moreover, the EU is likely to substantially decommission many of the mechanisms it has established to monitor minority protection. A new tacit policy consensus on inaction in the area of minority protection may emerge between the old member states and the new member states.

The achievement of enlargement, however, also brings a number of positive developments for minorities at the European level and at the level of the nation-state.

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<sup>66</sup> See also the brief discussion in de Witte, 490-91.

At the EU level, there is currently a process underway to redefine the character of the EU's institutions, norms and values, a process that will see the EU equip itself with a constitution. This constitution will almost certainly further develop the legal foundation for human rights in the EU, though it is not likely to directly contribute to a new minority rights regime.<sup>67</sup> Concurrently, the peer pressure generated by the Council of Europe in connection with the FCNM will intensify as the number of non-ratifying countries within the EU has fallen to a few recalcitrant cases. In the absence of a proactive EU or OSCE, the Council of Europe, and its Parliamentary Assembly, could assume a leading role in the field of minority protection. The existing legal rights, the regular monitoring mechanisms of the FCNM and the ECRML, the legal and political practice of accommodation of national groups and minorities in several old and new member states, ombudspeople's institutions, independent monitoring mechanisms like EUMAP and other NGO activities, and the potential for judicial activism, means that there is an array of possibilities for minority protection. These factors will keep the issue of minority rights high on the political agenda.

At the level of the nation state, the EU will shortly inject massive amounts of financial transfers, most of it in the form of regional funds, to the CEECs. These states are projected to enjoy high growth rates for years to come. The prospects are that socio-economic conditions will steadily improve and that democratic 'institution-building' will continue to develop. The new member states have accumulated much experience over the last decade with designing institutions and legislation to accommodate minorities. One of the major problems with their capacity to implement these designs is lack of resources. EU transfers and socio-economic development will provide resources that will help to close the 'capacity' gap between formal measures and implementation. Given that member states have wide decisional autonomy over regional funding from the EU, and most of the CEECs are fiscally highly centralized states, there is a major question over whether EU transfers will be accumulated by central elites or be conveyed down the administrative hierarchy to assist with, amongst other things, improvements in the position of minorities. Thus, there is a

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<sup>67</sup> The Convention for the Future of Europe, in which the candidate countries participate, does not go beyond the existing provisions of the TEU and the Charter in articulating minority protection. See the draft Constitution at [http://europa.eu.int/futurum/documents/offtext/const051202\\_en.pdf](http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf), especially Art. 1 (2), Art. 7, Art. 26 (1b).

danger that EU transfers will contribute to greater socio-economic differentiation along territorial and minority cleavage lines in the CEECs.

What is required is an effective EU-wide system for the evaluation of the implementation of the existing frameworks. An EU-wide monitoring mechanism is the first step towards such a system. NGOs such as the Open Society Institute are essential non-official watchdogs, but ideally monitoring mechanisms should be based on peer review and peer pressure, policy communication, learning and exchange, perhaps along the lines of the Open Method of Coordination practised in the EU's economic policy-making.<sup>68</sup> The interaction between different European models of minority rights protection is an interesting axis for future policy developments.

EU conditionality on respect for and protection of minorities is not clearly temporally correlated with the emergence of new political strategies and laws on minority protection in the CEECs. The timeframe for adoption of measures on minority protection often preceded the accession process as in Hungary and Slovenia. While the pressure on the CEECs to comply with European and international standards intensified after the enlargement process accelerated, the leverage power of the EU in minority protection, appears to have been anchored elsewhere, principally in the Recommendations of the Council of Europe and the OSCE. The ad hocism of the EU's Reports on the CEECs suggests that this instrument was employed less to promote EU norms and evaluate their implementation, but rather was more of a process-oriented process, that emphasized 'progress' at all costs. Nevertheless, perhaps one of the main achievements of the EU in the area of minority protection was that it successfully implanted the objective of 'minority protection' as an integral part of the political rhetoric of 'EU speak' in the CEECs. It may be that learning 'EU speak' is a step in the transmission of values that will be internalized and reflected, given time, in institutional change and modified political behaviour. Alternatively, the language of 'European' norms could be seen by some countries as the end in itself.

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<sup>68</sup> See *White Paper on European Governance* (2001).



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